MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1043

WILLIAM HOLLOWELL, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY,
Petitioner,

vs.

TOMMY McNEAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILLIAM HOLLOWELL, SUPERINTENDENT,
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vs.

TOMMY McNEAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 13, 1973.

OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi is reported at 231 So.2d 491 (Miss. 1970) and appears in Appendix D; the Opinion of the United States District Court is reported at 353 F.Supp. 485 (N.D. Miss. 1972) and appears in Appendix B; the Opinion of the Circuit Court of Appeals is the case on the merits and on the Petition for Rehearing and Petition for Rehearing En Banc is unreported and appears in Appendixes A and C, respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 13, 1973, with the denial of the Petition for Rehearing and Petition for Rehearing En Banc entered on November 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . ."

QUESTIONS PRESENTED

I.

Whether the affirmative defense of double jeopardy is waived when not raised in the state trial court.

II.

Whether a defendant, who through his attorney intentionally solicits a mistrial by causing an indispensable state witness and his lawyer to renege on repeated assurances that said witness would testify, should be allowed to defeat the ends of justice by claiming double jeopardy on retrial.

STATEMENT OF THE CASE

In March, 1968, the manager of a service station in Clarksdale, Mississippi, was killed during a robbery

attempt. Within days, Louis Banks was arrested as a prime suspect, and he gave a full eyewitness account of the crime. It being apparent that Banks was a "lesser actor" in the commission of the crime and after a conversation with Banks' attorney, Harvey Kellum, who assured the district attorney that his client would testify for the state, Banks was allowed to make a very low bond. Banks was indicted in July, 1968, along with McNeal and Roosevelt Ford, except that Banks was indicted in order to secure his presence as a witness. The trials were severed with McNeal the first to be tried on July 25, 1968.

Two witnesses were vital to the proof of the state's case—David Luster and Banks. Luster had told the district attorney, sheriff, grand jury and others that on the day following the murder, McNeal admitted to him that he (McNeal) shot the victim. Banks and his attorney had assured both the sheriff and district attorney that Banks would waive his right to invoke the privilege against self-incrimination and testify despite a pending indictment because, as Kellum testified, "after a review of the case he was convinced that the state's evidence was not sufficient to convict," and he thought he could thus arrange for favorable treatment for his client. Banks' attorney even repeated on the morning of the second day of the trial that he intended to allow his client to testify for the state.

On the afternoon of the second trial day after a number of preliminary witnesses had testified, the prosecutor called Luster to the stand, intending to call Banks as the last witness. Much to the surprise of the district attorney, Luster stated for the first time that it was Tommy McNeal, the defendant's *uncle*, who told him that he heard Tommy McNeal, the defendant, say that he had killed the station operator. He added that defendant McNeal

was not present when the statement allegedly occurred, and the uncle could not be located for the trial.

When Luster refused to recant, and his testimony could not be used, the pending testimony of Banks, already considered a crucial witness, became indispensable. Banks was called as a witness with no objection being registered by him or his lawyer. McNeal's lawyer was allowed to take him (Banks) off the stand for a conference which included Kellum. Ross had previously been trying to prevail upon Kellum not to let Banks testify, but he resumed his efforts at this conference with great vigor, "screaming" at Kellum, trying to convince Kellum not to permit his client to testify. Kellum stated that it was after this "conversation" with Ross that he changed his mind and would not let Banks testify. Banks was thereupon sworn and stated that he would not testify, claiming the Fifth Amendment privilege.

With this last witness gone, the prosecutor requested and was granted a *nolle prosequi* of the case. Within a few days, Banks was placed on trial for murder which ended in a directed verdict of not guilty, thus giving Banks immunity. (Mississippi does not have an immunity statute.) McNeal was re-indicted and brought to trial at the next term of court. Said trial culminated in his conviction and was affirmed on appeal.

After exhausting state remedies, a petition for writ of habeas corpus was filed under 28 U.S.C. §§2241 et seq. The district court assumed jurisdiction and held an evidentiary hearing, afterwards concluding that the *nol pros* was mandated by a "manifest necessity" procured by the defense. The Circuit Court of Appeals reversed with Circuit Judge Coleman dissenting. A Petition for Rehearing and Petition for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

I.

McNeal did not raise the question of double jeopardy in the trial court or on appeal. He thus waived that defense and is foreclosed from raising it in collateral proceedings. Almost all Circuit Courts, including the Fifth Circuit, have so held. See *Grogan* v. *United States*, 394 F.2d 287 (5 Cir. 1967), cert. den. 382 U.S. 896; *Barker* v. *Ohio*, 328 F.2d 582 (6 Cir. 1964); *United States* v. *Buonomo*, 441 F.2d 922 (7 Cir. 1971), cert. den. 404 U.S. 845; *Ferina* v. *United States*, 340 F.2d 837 (8 Cir. 1965), cert. den. 381 U.S. 902; *Haddad* v. *United States*, 349 F.2d 511 (9 Cir. 1965); *Morlan* v. *United States*, 230 F.2d 30 (10 Cir. 1956); *United States* v. *Scott*, 464 F.2d 832 (D.C. Cir. 1972); *Crawley* v. *Wilkerson*, 283 F.Supp. 447 (D.C. Va. 1968); Rule 12 (b) (2), F.R. Crim. P.

It may be claimed that *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), provides the controlling standard for waiver. However, the effect of that case has recently been eroded somewhat by the case of *Davis* v. *United States*, U.S. , 36 L.Ed.2d 216, 93 S.Ct. (1973), and *Tollett* v. *Henderson*, ... U.S. ....., 36 L.Ed.2d 235, 93 S.Ct. ..... (1973).

II.

The district court correctly found and the Fifth Circuit panel properly accepted "that Banks' use of the Fifth Amendment was largely the result of the actions of McNeal's counsel . . ." Through the exclusive efforts of McNeal's counsel, Banks was therefore made an "unavailable" witness. *U. S.* v. *Milano*, 443 F.2d 1022 (10 Cir. 1971), cert. den. 404 U.S. 943; *U. S. A.* v. *Collins*, ... F.2d ..... (5 Cir. 1973, No. 73-1080 decided May 31, 1973).

As stated in *United States* v. *Jorn*, 400 U.S. 470, 479 (1971), a criminal trial is "a complicated affair to manage." Unforeseeable circumstances may occur during trial making its completion impossible and necessitate another trial, *Wade* v. *Hunter*, 336 U.S. 684 (1949); the absence of a witness may, under certain circumstances, justify the discontinuance. *Downum* v. *United States*, 387 U.S. 734 (1963). In the language of *U. S.* v. *Perez*, 22 U.S. (9 Wheat. 579), 6 L.Ed. 165 (1824), a mistrial may be declared where "there is a manifest necessity for the act or the ends of public justice would otherwise be defeated." If there ever was a case of "manifest necessity" to discharge a jury before verdict to prevent the defeat of public justice, this is the one.[1]

The prosecutor had been repeatedly assured that Banks would testify. McNeal's counsel knew this, because all during the representation of his client he had been trying to prevail on Banks' attorney not to let him testify. As a last ditch effort, he takes the final state witness off the witness stand and after a "vociferous exchange" (the prosecutor testified that Ross was "screaming" at Kellum) prevails upon the witness, through his attorney, to become unavailable, knowing full well that this was the only witness with knowledge of facts necessary to convict a murderer. Somehow the majority panel below managed to use *Somerville* v. *Illinois*, ... U.S. ....., 35 L.Ed.2d 425 (1973) to shift the blame to the prosecution by the statement—"the practice followed in the state trial court would seem to create a situation with a tantalizing potential for prosecutorial misconduct." (Opinion, p. 10)

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1. In *Brock* v. *North Carolina*, 344 U.S. 424 (1953), this Court permitted reprosecution when two key government witnesses declined to testify on self-incrimination grounds. That decision, however, was based on Fourteenth Amendment standards.

The facts are undisputed that the prosecutor had *all* his witnesses at trial until the defendant deprived him of the opportunity to place the most important witnesses' testimony in evidence. The majority panel impliedly concedes that if a defense attorney were to "bribe, coerce, force or threaten a witness to claim the privilege against self-incrimination" (Opinion, p. 14), reprosecution would not be barred if unavoidable. Why should difference in method justify a different holding when the end result is identical? In either case the witness was rendered "unavailable"; in neither instance did the prosecution precipitate the mistrial; and in both cases the defense alone solicited the unavailability which led to the mistrial.

CONCLUSION

When the State is unsuspectingly deprived of its case because of the efforts of a defendant made an indispensable State witness unavailable to testify, justice mandates that there be another day. The decision was made to put a defendant to trial for murder because of continued assurances of the availability of a key witness. As Circuit Judge Coleman wrote in his dissent: ". . . eleventh hour defense stratagems in violation of all prior assurances leading to the suppression of indispensably necessary evidence . . ." should no more be tolerated than prosecution induced mistrials. The prosecution is entitled to present his case just as is the defense.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. F. SUMMER
Attorney General
By EDWIN A. SNYDER
Special Assistant Attorney General
Attorneys for Petitioner

CERTIFICATE

I, Edwin A. Snyder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to Honorable David M. Lipman, Attorney at Law, 233 North Farish Street, Jackson, Mississippi 39201.

This the 21st day of December, 1973.

.....

Special Assistant Attorney General

APPENDIX

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1214

TOMMY McNEAL,
Petitioner-Appellant,

versus

WILLIAM HOLLOWELL, Superintendent,
Mississippi State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

(July 13, 1973)

Before BROWN, Chief Judge, COLEMAN and DYER, Circuit Judges.

DYER, Circuit Judge: This habeas corpus petition presents the single important question of whether McNeal's trial and conviction in a Mississippi state court was

barred by an earlier jury trial on the same charge which was terminated, prior to a verdict and over McNeal's objection, by the prosecutor's successful request for a *nolle prosequi*. We conclude that the second trial violated the Fifth and Fourteenth Amendments' proscription against placing a person in jeopardy twice for the same offense. Accordingly we reverse.

When considering cases raising similar double jeopardy issues, the Supreme Court has consistently stated that it would be inappropriate to create a body of rigid and mechanical rules by which to judge the merits of the constitutional claim; instead the problem must be evaluated in terms of all the facts and circumstances of each individual case. *Illinois v. Somerville*, 1973, ... U.S. ....., 35 L. Ed.2d 425; *United States v. Perez*, 1824, 22 U.S. 579. Consequently, we set out in detail the circumstances that gave rise to McNeal's petition.

I.

In March 1968, the manager of a Clarksdale, Mississippi, gas station was killed in a robbery attempt. Several days later, Louis Banks was apprehended as a suspect and he gave a complete account of what transpired at the gas station. Because of his cooperation and because he was believed to be a "lesser actor" in the murder, he was allowed to make a reduced bond, but, on July 11, 1968, he was indicted, along with McNeal and Roosevelt Ford, for the murder of the station attendant. The trials of the three defendants were severed and McNeal was tried first, initially on July 25, 1968.

In preparing for McNeal's trial, the prosecutor realized that he had two key witnesses. The first, David Luster, was not totally cooperative or consistent, but he

had stated on several occasions that McNeal told him that he was the one who had shot the station attendant. The second key witness was Banks, whose retained counsel was Joseph Kellum. In his discussions with the prosecutor prior to and even early in the trial, Kellum indicated that his client would not invoke his Fifth Amendment privilege against self-incrimination.[1]

McNeal was brought to trial on July 25, 1968, and a jury was impaneled and sworn. On the second day of trial after thirteen witnesses had testified for the State, the prosecutor called Luster to the stand, planning to call Banks next as the State's last witness.

Luster's testimony on the stand was not what the prosecutor either wanted or expected. Instead of testifying that he heard Tommy McNeal, the *defendant*, say that he had killed the station attendant, Luster stated that Tommy McNeal, the defendant's *uncle* had told him that Tommy McNeal, the defendant, had said that he had killed the attendant. Following this surprise, the prosecutor made an extensive attempt to get Luster to recant this testimony, but Luster refused to change his story. With Tommy McNeal, the uncle, unavailable as a witness, the status of Banks as an already crucial witness was heightened.

Banks was then called to the stand as a witness. At this time McNeal's counsel, Harvey Ross, apparently obtained permission from the court to speak to Banks and

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1. According to Kellum's testimony at the federal habeas hearing, he took this position because he felt the State had a weak case against his client and because he hoped to get a deal of some sort from the State. He stated, however, that prior to the trial he had not obtained a definite agreement of any kind from the prosecution. The State prosecutor testified at this same hearing that "it was understood" by Kellum that Banks would take the stand as a prosecution witness; in return, Banks would not be prosecuted.

his attorney, Kellum, in an anteroom off of the courtroom.[2] Following a vociferous, but unreported exchange Kellum returned to the courtroom and announced that he would not allow his client, Banks, to testify. Banks was then sworn and he stated that he would not testify, claiming his Fifth Amendment privilege.

With both of his key witnesses unable or unwilling to substantiate the State's case, the prosecutor immediately requested that the case against McNeal be "nolle prosequied." McNeal's counsel objected, requesting a conclusion of the trial on the merits or, if the State had no further proof, a directed verdict of acquittal. The court thereupon granted the prosecutor's motion and discharged the jury, stating that the prosecutor "has found out after getting into it that he is unable to make out his case."[3]

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2. The transcript of McNeal's first trial has only been partially transcribed for our use. The portion of the proceedings that includes the testimony of Luster and the appearance of Banks has been reproduced, however, and this does not show any reference to Ross' request for a conference with Banks and Kellum at that time. It is clear nevertheless that Ross had spoken with Kellum several times during the trial about whether Banks would testify. Consequently, the district court's conclusion, based on the testimony at *its* hearing, that there was a conference just after Banks was called is not clearly erroneous.

3. The following is a complete transcript of the exchange between the court, the prosecutor, and Ross, immediately following the dismissal of the witness Banks.

COURT: Call your next witness, please.
MR. STONE [prosecutor]: Your Honor, we ask that this case against the defendant be nolle prosequied, Your Honor.
COURT: Call your next witness.
MR. STONE: Your Honor, we move that this case be nolle prosequied.
MR. HARVEY T. ROSS: If the Court please, we object to that motion.
COURT: You object to the nolle prosequi?
MR. ROSS: This defendant is entitled to have this case disposed of on its merits at this point. If the State has no further proof, this defendant is entitled to a directed verdict of not guilty.

(Continued on following page)

A few days after the *nolle prosequi* in the McNeal case, Banks was placed on trial for murder. According to the same prosecutor's later testimony, he intentionally offered little evidence in this case because he knew that the court would direct a verdict of not guilty, which would have the effect of granting Banks immunity.[7] McNeal was quickly re-indicted and came to trial again in February 1969 at the next term of court. This trial culminated in his conviction, which was affirmed on appeal. McNeal subsequently exhausted his State post-conviction remedies and filed his federal habeas corpus petition. Following a full evidentiary hearing, the district court concluded that any necessity for a *nolle prosequi* in the first trial was precipitated by McNeal's counsel's last-minute confer-

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Footnote continued—

> COURT: I think the State can ask for a nolle prosequi at any time. I think the District Attorney can ask for a nolle prosequi at any time — I have never seen an objection before to a nolle prosequi.
> MR. ROSS: If the Court please, this is a charge of murder. The District Attorney has had six months to prepare this case.
> COURT: I am going to grant the motion for nolle prosequi. Let the jury come in.
> COURT: (To jury) Ladies and gentlemen of the jury, the District Attorney has very commendably asked for a nolle prosequi in this case; he has found out after getting into it that he is unable to make out his case, and he has asked that the case be nolle prosequied against this defendant, and the Court is following the recommendation of the District Attorney, and he is entering a nolle prosequi.
>
> * * *
>
> JURY DISMISSED — — COURT ADJOURNED

4. The prosecutor's attitude toward Banks' trial parallels his unorthodox attitude with respect to the original indictment against Banks. At the federal habeas hearing he stated that the Banks indictment was sought not with the intent to pursue a conviction, but essentially "to ensure his presence" at McNeal's trial. When that mute presence at McNeal's first trial was insufficient to yield a conviction, the prosecutor extended the charade by first staging a sham trial against Banks and by then using the "immunized" Banks before the same grand jury to obtain a second indictment of McNeal and before a different jury to obtain the conviction now questioned.

ence with Banks and his attorney. Consequently, the habeas petition was denied.

II.

McNeal's argument in condensed form is that there was no improper conduct by his counsel at the first trial and that the state trial judge abused its discretion by granting a *nolle prosequi* long after the jury had been impaneled and substantial evidence had been offered. The State responds that no judicial or prosecutorial misconduct has been shown to have occurred and that the district court's finding that a manifest necessity for the *nolle prosequi* existed because Banks' Fifth Amendment claim was solicited by McNeal's counsel is not clearly erroneous. We thus face the seemingly uncomplicated task of applying the law on double jeopardy to the facts before us.

III.

The law regarding double jeopardy has recently been carefully reviewed and explained by the Supreme Court in *Illinois v. Somerville*, 1973, ... U.S. ....., 35 L.Ed.2d 425, and by this Court in *Smith v. Mississippi*, 5 Cir. 1973, ... F.2d ..... [No. 72-1325, May 7, 1973]. Therefore, with reference to these two cases we refrain from treating *in extenso* all of the principles and policies inherent in the theory of double jeopardy and instead direct our attention to the particular factors which have a bearing on the resolution of the issue before us.

The Fifth Amendment's proscription against placing a person in jeopardy twice for the same offense has been applied to the states through the Due Process Clause of the Fourteenth Amendment and this application must be made retroactively. *Benton v. Maryland*, 1969, 395 U.S.

784; *see Price v. Georgia*, 1970, 398 U.S. 323, 331 n. 9; *Ashe v. Swenson*, 1970, 397 U.S. 436, 437 n. 1; *Waller v. Florida*, 1970, 397 U.S. 387, 391 n. 2; *North Carolina v. Pearce*, 1969, 395 U.S. 711; *Galloway v. Beto*, 5 Cir. 1970, 421 F.2d 284, *cert. denied*, 400 U.S. 912.

Because "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy," *United States v. Ball*, 1896, 163 U.S. 662, 669, it is necessary to determine when jeopardy attaches in a jury trial. In *Downum v. United States*, 1963, 372 U.S. 734, the Supreme Court recognized that this occurs when the jury is impaneled and sworn, thus vesting the defendant with the valued right to have his trial completed before that tribunal and that jury. *See Wade v. Hunter*, 1949, 336 U.S. 684, 689.

This "valued right" is not absolute, however, and the determination that jeopardy has attached is the first step on the road to a decision on the double jeopardy question, and not the last. When, as in this case, jeopardy has attached, and only then, the inquiry shifts to the trial judge who, in his sound discretion, must consider all the circumstances to determine whether there is a manifest necessity to dismiss the jury without a verdict or whether the ends of public justice would otherwise be defeated. *United States v. Perez*, 1824, 22 U.S. 579, 580.

The problem of moving from the general formulation in *Perez* to the facts of an individual case is complicated by the absence of any rigid rules, which makes categorization of earlier cases extremely difficult. *See Wade, supra* at 691. The Supreme Court in *Somerville*, while continuing to reject a rigid classification, did distill a general approach from the previously decided cases and recognized at least two lines of precedent.

The first generalization is that a trial judge correctly declares a mistrial[5] when, in his discretion, "an impartial verdict cannot be reached or . . . a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Somerville, supra* at 431.[6] The fatally defective indictment in *Somerville* fell into this class, as would the potentially prejudiced juror in *Smith*.[7]

Our case simply does not even remotely resemble the cases relied on in *Somerville*, or those which have since followed it. The first state trial below contained no hint of prejudice that would have impeded the attainment of an impartial jury verdict; similarly no procedural error has been called to our attention that would warrant the jury's dismissal so as to implement a reasonable state policy and serve the ends of public justice.

The second line of precedent recognized in *Somerville*, however, is potentially more useful to us. The Supreme Court there noted that the declaration of a mistrial based

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5. It has not been suggested, nor do we think it could be, that the *nolle prosequi* in this case differed in any material respect from a mistrial, which is the most common source of double jeopardy claims.

6. *See Lovato v. New Mexico*, 1916, 242 U.S. 199 (reprosecution not barred when jury discharged after prosecution realized that defendant had not been re-arraigned after his demurrer to the indictment was overruled); *Thompson v. United States*, 1894, 155 U.S. 271 (reprosecution not barred when mistrial declared following discovery that one member of jury was disqualified as having been a member of the grand jury that indicted the defendant).

7. In *Somerville*, the indictment under which the defendant was being tried did not allege the necessary elements of a crime, and this defect, which could not be remedied, could have been asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction. In *Smith*, after a careful investigation of the circumstances surrounding a remark made by one of the jurors, the trial judge concluded that that juror had prematurely formed an opinion about an important element of the case.

on "a rule or a defective procedure that [lends] itself to prosecutorial manipulation" would be an entirely different case. 35 L.Ed.2d at 431. Presumably such a case would require the invocation of the Fifth Amendment's bar to reprosecution.

On its face, the granting of the motion for a *nolle prosequi* below fits squarely within this principle. The primary example given for this general approach was *Downum*, *supra*, which the *Somerville* Court considered to be a case "where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." 35 L.Ed.2d at 434. In McNeal's case, the *nolle prosequi* resulted in a delay in trial of over six months and was ostensibly granted by the trial judge because the prosecutor "has found out after getting into it that he is unable to make out his case." *See* footnote 3, *supra*. Since a *nolle prosequi* in Mississippi does not, and obviously did not, preclude reindictment and retrial, the practice followed in the state trial court would seem to create a situation with a tantalizing potential for prosecutorial misconduct.

The State responds to this argument by contending that the language used by the trial judge in discharging the jury is not dispositive of the reasons behind the discharge, that there was a manifest necessity for the *nolle prosequi*, and that the necessity arose out of the conduct of McNeal's counsel. Its argument is based on the general rule that a defendant who successfully moves for a mistrial, knowing that his actions will result in a trial to another jury, cannot invoke the bar of double jeopardy at the second trial. *United States v. Beasley*, 5 Cir. 1973, ... F.2d ..... [No. 72-2197, April 13, 1973]; *United States v. Iacovetti*, 5 Cir., 1972, 466 F.2d 1147, 1152, *cert. denied*,

1973, ... U.S. ....., 35 L.Ed.2d 270. From this rule flows the State's main premise, that a defendant who actively engages in a course of conduct calculated to necessitate the granting of a mistrial, but who does not actually request a mistrial, is similarly barred from relying on a double jeopardy defense at a second trial. *See United States v. Pridgeon*, 5 Cir. 1972, 462 F.2d 1094; *United States v. Walden*, 4 Cir. 1971, 448 F.2d 925, 929; *Loux v. United State*, 9 Cir. 1968, 389 F.2d 911, 921, *cert. denied*, 393 U.S. 867, 869. *See also United States v. Jorn*, 1971, 400 U.S. 470, 487-88 (Burger, C.J., concurring).

We take no issue with either rule advanced by the State but, upon our reading of the record, we conclude that neither is applicable to the case before us. It is plain from the record that the situation which led the prosecutor to move for a *nolle prosequi* was caused by the confluence of three factors.

The first factor was Luster's testimony, which, due to its hearsay nature, could not be used by the prosecutor to support the case against McNeal. There has been no hint of a causative link, however, between McNeal and his counsel on the one hand and Luster's vacillation on the other. The prosecutor simply took a chance on a questionable witness and lost. As such, this factor is of absolutely no assistance to the State in its attempt to establish a manifest or imperious necessity for the *nolle prosequi*.

The second factor was the prosecutor's reliance on the testimony of co-indictee Banks to link McNeal to the murder. Without reference to the tactics used to make Banks available to testify, *see* footnote 4, *supra*, it is clear that the prosecutor took another chance by placing Banks on the stand while he was still under an indictment for the same offense. Mississippi apparently has no general

immunity statute, but, in retrospect, certain steps could have been taken that would have increased the likelihood of Bank's testifying.[8] Instead, the prosecutor chose to rely on an informal "understanding," which he felt he had with Kellum, Banks' counsel. Although this may not have been completely unreasonable under the circumstances, the continuing real possibility that Banks would invoke the Fifth Amendment's protection cannot, without more, be "blamed" on McNeal so as to create the manifest necessity that would allow a *nolle prosequi* to insure that the ends of public justice were not defeated.

The final factor that influenced the situation was the actual invocation of the Fifth Amendment by Banks. The district court concluded that "the invocation of the privilege against self-incrimination was largely the result of the course pursued by petitioner's trial counsel; a course which was a solicitation for the mistrial." We accept the finding of fact of the district court—that Banks' use of the Fifth Amendment was largely the result of the actions by McNeal's counsel—because, on the record before us, it is not clearly erroneous. Fed.R.Civ.P. 52(a); *see, e.g. Corpus v. Beto*, 5 Cir. 1972, 469 F.2d 953. Nevertheless, the district court's legal conclusion—that this action is tantamount to a solicitation of a mistrial—is untenable.

The State would have us liken our case to ones which concerned an unavailable witness. It acknowledges that if the witness is unavailable through sloppy prosecutorial

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8. Without condoning the tactic of obtaining the initial indictment against Banks, once that had been accomplished, the "immunizing" trial of Banks could easily have preceded the McNeal trial. Alternatively, the prosecutor could have sought a *nolle prosequi* or a "remand to the files" on the Banks indictment prior to McNeal's trial. Neither of these last steps would have totally barred a subsequent prosecution of Banks, but either would have been a more concrete demonstration of the State's lenient attitude toward him.

preparation, then there is no manifest necessity for a mistrial. *See, e.g. Downum, supra*; *Cornero v. United States,* 9 Cir. 1931, 48 F.2d 69. Conversely, because both litigants in a criminal trial are held to high levels of professional standards, *see Jorn, supra* at 486, the State argues that if it is the defendant who makes a witness unavailable, then any resultant mistrial should not be a bar to reprosecution. *Cf. ABA Code of Professional Responsibility DR 7-109(B).* The State then takes a final leap of faith by concluding that discussing the privilege against self-incrimination with a witness and his attorney and convincing this attorney to have his client plead the Fifth Amendment, makes the witness just as unavailable as if the defense counsel had secreted the witness outside of the jurisdiction of the court. We disagree.

We start from the premise that an individual may not bribe, coerce, force, or threaten a witness to claim the privilege against self-incrimination. *See* 18 U.S.C.A. § 1503; *Cole v. United States,* 9 Cir. 1964, 329 F.2d 437, *cert. denied,* 377 U.S. 954. *See also United States v. Herron,* N.D. Cal. 1928, 28 F.2d 122. None of these forms of conduct has been even tangentially attributed to Ross, McNeal's counsel. Instead, in the course of preparing for the trial of his client, Ross contacted the key witness Banks and his attorney Kellum, apparently impressed on Kellum the danger of Banks' testifying while still under indictment for the same offense, and reminded him of the protection afforded by the Fifth Amendment. This conduct was wholly different than the secretion of a witness suggested by the State and we perceive no impropriety in it.

According to the prosecutor's later testimony, this meeting with Banks at the trial was the first opportunity Ross had had to discuss the case with him. Additionally,

it is not suggested that Ross prevailed directly on Banks at this time. Rather it is agreed that at all times Banks' counsel Kellum was exercising his own discretion and that he personally made the final decision to have Banks plead the Fifth Amendment.

On these facts, Ross' conduct was no more than the legitimate action of a defense counsel who was contacting an important witness—a co-indictee—and his counsel to discuss a matter of mutual importance to them. While we need not go so far as to say that it was Ross' duty to do this, we have no doubt that he was entitled to do it and that to do so he need not relinquish any of his clients rights—here the valued right to have his trial concluded before the first jury.

We conclude that no manifest necessity and no ends of public justice required the granting of the *nolle prosequi* in McNeal's first trial. The prosecutor's uncomfortable position was caused by nothing more unusual than his reliance on a vacillating witness and on one whose testimony he had not sufficiently insured would be forthcoming. Ross, acting within this authority and professional responsibility, did no more than point out what at that time was a weakness in the presentation of the State's case. We hold that the granting of the *nolle prosequi* in order to allow the State an opportunity to shore up that weakness violated McNeal's Fifth and Fourteenth Amendment rights.

In reaching this decision we are not unmindful of the strong public interest in the efficient administration of justice. This is generally protected by the trial judge who, prior to granting or denying a motion for a mistrial or *nolle prosequi*, should make a painstaking examination of all the facts and circumstances that underlie the request. Only after such a careful investigation can a trial judge

properly exercise his discretion as recognized in *Perez. Jorn, supra* at 487; *Smith, supra.* It is clear from the record that the first state trial judge made no investigation into the reasons behind the prosecutor's request.[9] If he had, McNeal might never have been subjected to this constitutionally impermissible second trial.

REVERSED.

COLEMAN, Circuit Judge dissenting:

As he invariably does, my Brother Dyer has written a perfectly constructed opinion, distinguished for its clarity. I agree with its splendid exposition of constitutional principles generally applicable to double jeopardy. The problem is that I do not agree with the majority's application of those principles to McNeal's case.

When James Bogan Weems went to work on March 9, 1968 there was no reason to anticipate that before the day was out he would be a corpse, made so by an armed robber, who escaped to Chicago, where he was later apprehended and extradited. Nevertheless, all persons, including killers, are entitled to certain specified protections vouchsafed by the Constitution of the United States. On post-conviction collateral attack, however, we should be certain that the Constitution requires it before we set free a convicted murderer.

We could readily rely on the able reported opinion of the United States District Judge, who held that McNeal

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9. The district court's Memorandum of Decision states, "While the trial judge in the state court acted immediately on the prosecutor's request for a *nolle prosequi*, without requiring him to explore alternative avenues, the record reflects that the trial judge was fully advised and informed of all matter necessitating the *nolle prosequi*." Our review of the record convinces us that the trial judge was not so informed and any finding of fact to the contrary is clearly erroneous. *See* footnote 3, *supra.*

was entitled to no relief, *McNeal v. Collier*, 353 F.Supp. 485 (N.D., Miss., 1972). I must, however, make some observations of my own.

McNeal's conviction was affirmed on appeal, 231 So.2d 491 (Mississippi Supreme Court, 1970). The question of double jeopardy was not raised either in the trial court or on appeal. After the State Supreme Court had affirmed the conviction, petitioner retained new counsel for the purpose of launching a collateral attack. Leave to file a petition for writ of error coram nobis was denied, §1992.5 Mississippi Code of 1942. The federal habeas corpus proceedings followed.

Almost from the beginning it has been held that the defense of double jeopardy must be raised at the trial, else it is waived, *United States v. Wilson*, 32 U.S. 150, 8 L.Ed. 640 (1833). This principle has been reiterated in numerous cases. As recently as 1967, the Fifth Circuit reaffirmed it, *Grogan v. United States*, 5 Cir., 1967, 394 F.2d 287, cert. denied 382 U.S. 896. See also, *Brady v. United States*, 8 Cir., 1928, 24 F.2d 399, cert. denied 278 U.S. 603, 49 S.Ct. 10, 73 L.Ed. 531; *McGinley v. Hudspeth*, 10 Cir., 1941, 120 F.2d 523; *Barker v. State of Ohio*, 6 Cir., 1964, 328 F.2d 582; *Haddad v. United States*, 9 Cir., 1965, 349 F.2d 511, cert. denied 382 U.S. 896, 86 S.Ct. 193, 15 L.Ed.2d 153; *United States v. Buonomo*, 7 Cir., 1971, 441 F.2d 922, cert. denied 404 U.S. 845; *United States v. Scott*, D.C. Cir., 1972, 464 F.2d 832; Rule 12(b)(2), Fed.R.Crim.P.

The District Court held that since McNeal was not informed by his attorney or anyone else that he could not for the same offense constitutionally be twice placed in jeopardy he did not waive his right subsequently to raise the claim, citing *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Winters v. Cook*, 5 Cir., 1972, 466 F.2d 1393 [now on sub-

mission en banc]. Hard and fast waiver rules are beginning to meet with exceptions, as witnessed by *Davis v. United States*, 1973, ... U.S. ..... [41 L.W. 4478] and *Tollett v. Henderson*, 1973, ... U.S. ..... [41 L.W. 4486].

The question now is whether McNeal, even in the absence of a waiver, is entitled to habeas corpus relief on the collaterally raised plea of double jopardy. I would respond in the negative.

I refer to the findings of the District Court, 353 F.Supp. at 488:

> "Banks' attorney had previously assured both the sheriff and the district attorney that Banks would waive his right to invoke the privilege against self-incrimination. This assurance was made despite a pending indictment because, as the attorney later testified, after a review of the case he was convinced that the state's evidence was not sufficient to convict, and he thought he could arrange with the prosecuting officials for a light charge or favorable treatment for his client. On the morning of trial, the district attorney held a conference with Banks, and reviewed his testimony. On the same day, his attorney again indicated that Banks would testify.
>
> "When Banks, the final witness, was called to the stand, McNeal's attorney asked for a recess to talk with Banks and confer with his counsel, who was present in the courtroom. The request was honored, and after a conference both attorneys returned to the courtroom to announce that Banks would not be permitted to testify. Aware that the privilege may only be invoked by those who claim its protection, the trial judge called Banks as a witness and interrogated him. On the advice of counsel, Banks refused to testify.

"During the evidentiary hearing, Banks' attorney summarized the event which prompted his abrupt decision:

> Q. Now, at what point did you change your mind not to let Banks testify?
>
> A. When I was in the anteroom with my client and (McNeal's attorney) . . . I decided then . . . I told (McNeal's attorney) that I had changed my mind and I was not going to permit him to testify because I thought it was to his best interest not to testify. I am referring there to Banks.
>
> Q. Was this decision prompted by anything that was said by anyone?
>
> A. No, sir. I realized there when (McNeal's attorney) and I were talking over the matter that I had not received a definite commitment, that I might be making a terrible mistake. . . . It was my sole decision, because my client was a young black boy. . . .

McNeal's attorney also recalled the episode:

> A. I had several conversations with (Banks' attorney) during the day . . . I don't remember how many. . . . During the course of my defense of Mr. McNeal, I of course, as I remember, was trying to prevail upon (Banks' attorney) not to let him testify. . . . And I believe I did have one final conversation . . . with the court's permission . . . immediately prior to his being called to testify.
>
> Q. What occurred in that conversation . . .?
>
> A. . . . I am certain that I must have tried to prevail upon (him) not to allow (Banks) to testify. I am sure that I, myself tried to convince (him) that it would be to his client Banks' interest that

> he not testify. And my recollection is . . . that (he) must have agreed because he didn't allow him to testify."

It must be emphasized that this is not a case in which the District Attorney began a trial and thereafter with no supervening event simply decided to *nol pros* in the hope of doing better on another day. Such a course would be indefensible, would clearly amount to jeopardy, and would warrant the most severe condemnation.

The facts here are exactly the opposite. As found by the District Court, McNeal's attorney testified that during his representation of the defendant he had been trying to "prevail" on Banks' attorney not to let him testify. Despite these efforts, that attorney had assured both the sheriff and the district attorney that his client would waive the right to invoke the privilege against self-incrimination. On the very day that Banks was called to the witness stand, these assurances were repeated. The defense had never placed Banks under subpoena as a witness. Yet, when Banks, *with no objection from him or from his lawyer,* was about to take the witness stand, defense counsel was then allowed to take him off the stand for a conference, which included his attorney. Experienced trial lawyers will instantly recognize this, directed toward an unsubpoenaed opposing witness, as a most bizarre, if not wholly unknown, procedure. It is quite evident that defense counsel wished to make one last effort to "prevail" on Banks' lawyer not to let him take the stand. As the majority opinion states, "a vociferous exchange" followed, *but the last ditch effort worked.* Banks' counsel completely reversed the position theretofore steadfastly maintained against all efforts to the contrary. At the brink of the Rubicon, contrary to all expectation, Banks refused to testify.

Advising a man of his constitutional rights is certainly not an impermissible act. Efforts to "prevail" on him not to testify, importunities at the last minute, calling one off the witness stand who is neither one's witness nor his client, are matters of an entirely different character, especially within the setting of this case.

Even if one lawyer is justified in cajoling another lawyer's client to violate agreements previously given, which I greatly doubt, Banks was not "advised" to stay off the witness stand. He was *importuned*, *persuaded*, and *prevailed upon* to stay off. This in the face of repeated assurances of his availability. Defense counsel knew all this. I do not castigate defense counsel (now deceased) for doing what he could to save his client. I do think that his activities must objectively be judged and that under any minimal code of professional ethics assurances from one member of the Bar to another are worth at least enough to justify counsel in making the crucial decision to put a defendant to trial. To further extend the thought, when the State is deprived of its case while unsuspectingly relying upon such assurances, there ought to be another day. I think the district attorney in this case was met with an event no less unexpected than if a juror had discussed the case with a witness, or some like event.

Of inescapable importance this situation was deliberately precipitated solely by the defense. Banks, with no objection from him or his counsel, was in the very act of taking the stand when the defense, contrary to all customary precedent, called him off for the "vociferous exchange". This was the last frantic struggle to head off the testimony of the one and only witness who knew the facts necessary to a conviction of an armed robbery murder. It is not enough to say that the district attorney was simply disappointed.

The inept handling of Banks' immunity status should be none of McNeal's concern. He was neither the beneficiary nor the victim of that phase of the case. The fundamental issue was McNeal's guilt or innocence, not how Banks was being handled. *Banks was not McNeal's witness and McNeal's lawyer was not Banks' lawyer.*

A death knell stratagem which causes a witness and his lawyer to welsh on assurances repeatedly given, assurances upon which the district attorney had every reason to rely up to and even after he called the case to trial, should not be allowed to abort justice.

Under the circumstances of this collateral attack, I do not believe that the Constitution requires a belated plea of prior jeopardy to produce an injustice of the most critical gravity. In the words of *Perez*, cited in the majority opinion, the *nol pros* was mandated by a "manifest necessity", not caused by the prosecution but procured by the defense, and it was necessary to prevent the "defeat of public justice".

With deference, I should think that this Court should firmly plant its judicial feet upon the solid ground, after a jury is sworn to try the issue, that mere prosecution-induced abandonments of the trial will not be tolerated; but, on the other hand, eleventh hour defense stratagems in violation of all prior assurances leading to the suppression of indispensably necessary evidence will inexorably meet the same fate.

I respectfully dissent.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC 7234-S

TOMMY McNEAL,
Petitioner

v.

JOHN ALLEN COLLIER, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY,
Respondent

Memorandum of Decision

Tommy McNeal, a young black male, was brought to trial on a murder charge during the July, 1968 term of the Circuit Court of Coahoma County, Mississippi. However, because of an unexpected development, the trial was aborted during the presentation of the state's case, and the jury dismissed over the objection of defense counsel. Six months later, in the January, 1969 term, McNeal was again brought to trial on the same charge. On this occasion the trial was completed, and McNeal was convicted. The Mississippi Supreme Court, without considering the issue raised here, affirmed the conviction, and McNeal is now serving a life sentence. *McNeal* v. *State of Mississippi*, 231 So.2d 491 (Miss. 1970). Contending that the state twice subjected him to jeopardy for the same offense, McNeal has petitioned this court for habeas corpus relief. 28 U.S.C.A. §§ 2241, 2254.

Having determined that the petitioner exhausted available state remedies, this court conducted an evidentiary

hearing on October 10, 1972. Petitioner, an indigent, proceeded *in forma pauperis*, and was ably represented by legal aid counsel. The court has considered memoranda submitted by the parties, state court transcripts, and a partial transcript of the evidentiary hearing. The action is ready for decision.

Each case in which a double jeopardy claim is raised must, to repeat the legal cliche, turn upon its own facts. *Downum* v. *United States*, 372 U.S. 734 (1963). The facts of this case will be considered in detail before the law is applied.

During an attempted robbery on March 9, 1968, a service station attendant was murdered in Clarksdale, Mississippi. Tommy McNeal, Louis Banks and one other were indicted for the offense. A severance was granted as to each of the defendants, and McNeal's case was the first called for trial. Of the other defendants, one was never tried and Banks was acquitted in circumstances described below.

Although the state intended to call fifteen witnesses, only two were able to substantially link petitioner with the murder: Louis Banks, co-indictee, and David Luster, a fifteen year old boy who had no personal connection with the incident, but who claimed to have overheard McNeal admit shooting the attendant. Luster had apparently provided a vacillating or conflicting story; however, the district attorney interviewed him on more than one occasion, and by the day of trial was satisfied that Luster's testimony would be admissible, and would tend to establish the petitioner's guilt.

Banks, under indictment for the same offense, was obviously a witness for whom the Fifth Amendment privilege would have been readily available. Law enforcement

officials, however, had earlier concluded that Banks played only a minor role in the tragedy, and, after consultation with his attorney, agreed that a *nolle prosequi* would be entered in return for Banks' testimony in the trial of McNeal. In fact, it is clear that Banks was indicted only to insure his availability as a witness. Banks, incidentally, was the only one of the three released on bond.

Although the district attorney was an experienced prosecutor, he had never attempted to place a co-indictee on the stand. His only insurance was an oral agreement to testify. Nevertheless, he was satisfied with this assurance.

From the state's vantage point, the case was apparently proceeding smoothly until David Luster, the fourteenth witness, was called to the stand. An excerpt of his testimony follows:

> Q. All right, on the day after (the attendant) was killed, on Sunday, did you see the defendant Tommy McNeil (McNeal)?
>
> A. I saw him that Sunday, in the afternoon.
>
> Q. Afternoon. Where and in whose company?
>
> A. I saw him, Louis Banks, James Patterson, Roosevelt Ford and Tommy McNeil, uncle.
>
> Q. There are two Tommy McNeils?
>
> A. Yes, sir. . . .
>
> Q. I am referring now to the defendant, Tommy McNeil . . . what conversation did you have with him . . . just tell it in detail?
>
> A. I didn't have no conversation with him.
>
> Q. You didn't have any conversation with him?
>
> A. No, sir.

Q. Who did you have a conversation with?

A. I had a conversation with his uncle.

Q. Was it in his (the defendant's) presence?

A. . . . he come in the room and left out . . . me and his uncle had just finished talking.

After a brief flurry, the jury was directed to retire. Claiming surprise, the district attorney reminded Luster of his testimony before the grand jury, and his previous statements. Luster was examined in detail: in fact, he was harangued, exhorted and cajoled. However, maintaining that his prior statements were the result of unspecified intimidation, Luster repeatedly testified that Tommy McNeal, the uncle, had told him that Tommy McNeal, the accused, shot the station attendant. At the evidentiary hearing, the district attorney stated that he was unable to locate the uncle in order to present him as a witness.

The jury returned, and testimony resumed. Luster, however, refused to recant. After the jury retired again, the district attorney dismissed Luster, and executed an affidavit for a perjury charge. The pending testimony of Banks, earlier anticipated as the key to the trial, now assumed even greater significance.

Banks' attorney had previously assured both the sheriff and the district attorney that Banks would waive his right to invoke the privilege against self-incrimination. This assurance was made despite a pending indictment because, as the attorney later testified, after a review of the case he was convinced that the state's evidence was not sufficient to convict, and he thought he could arrange with the prosecuting officials for a light charge or favorable treatment for his client. On the morning of trial, the district attorney held a conference with Banks,

and reviewed his testimony. On the same day, his attorney again indicated that Banks would testify.

When Banks, the final witness, was called to the stand, McNeal's attorney asked for a recess to talk with Banks and confer with his counsel, who was present in the courtroom. The request was honored, and after a conference both attorneys returned to the courtroom to announce that Banks would not be permitted to testify. Aware that the privilege may only be invoked by those who claim its protection, the trial judge called Banks as a witness and interrogated him. On the advice of counsel, Banks refused to testify.

During the evidentiary hearing, Banks' attorney summarized the event which prompted his abrupt decision:

> Q. Now, at what point did you change your mind not to let Banks testify?
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> A. When I was in the anteroom with my client and (McNeal's attorney) . . . I decided then . . . I told (McNeal's attorney) that I had changed my mind and I was not going to permit him to testify, because I thought it was to his best interest not to testify. I am referring there to Banks.
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> Q. Was this decision prompted by anything that was said by anyone?
>
> A. No, sir. I realized there when (McNeal's attorney) and I were talking over the matter that I had not received a definite commitment, that I might be making a terrible mistake. . . . It was my sole decision, because my client was a young black boy. . . .

McNeal's attorney also recalled the episode:

> A. I had several conversations with (Banks' attorney) during the day . . . I don't remember how many. . . . During the course of my defense of Mr. McNeal, I of course, as I remember, was trying to prevail upon (Banks' attorney) not to let him testify. . . . And I believe I did have one final conversation . . . with the court's permission . . . immediately prior to his being called to testify.
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> Q. What occurred in that conversation. . .?
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> A. . . . I am certain that I must have tried to prevail upon (him) not to allow (Banks) to testify. I am sure that I, myself, tried to convince (him) that it would be to his client Banks' interest that he not testify. And my recollection is . . . that (he) must have agreed because he didn't allow him to testify.

The district attorney immediately requested a *nolle prosequi*; the request was granted, and the jury discharged over the defendant's objection. The *nolle prosequi*, of course, was tantamount to a mistrial granted on behalf of the state.

Within a few days and at the same term of court, Banks was placed on trial for murder. The district attorney intentionally failed to put on substantial proof. Upon motion, Banks was awarded a directed verdict of acquittal. After the acquittal of Banks, the court called the Grand Jury back into session. Using Banks as a witness, the district attorney obtained a new indictment against McNeal.

At the next term of court, McNeal, now represented by the attorney who earlier represented Banks, was again

tried on the same charge but under the new indictment. Banks testified at the second trial, and the jury returned a guilty verdict. The petitioner's attorney failed to raise the issue of double jeopardy at trial or upon appeal; frankly, this potential defense did not occur to him.

McNeal was not informed by his attorney, or anyone else, that he could not be twice placed in jeopardy for the same offense, and that such was prohibited by the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. Under the circumstances, it is clear that the petitioner did not waive his right to subsequently raise a claim of former jeopardy. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Winters* v. *Cook*, ... F.2d ..... (No. 71-3323 5th Cir. Sept. 20, 1972).

On appropriate occasions, the Fifth Amendment serves as a shield to protect the accused from multiple or successive prosecutions for the same offense, whether initiated on behalf of the United States or any respective state. *Benton* v. *Maryland*, 395 U.S. 784 (1969), overruling *Palko* v. *Connecticut*, 302 U.S. 319 (1937). Where required, protection is to be applied retroactively. *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Price* v. *Georgia*, 398 U.S. 323 (1970); *Galloway* v. *Beto*, 421 F 2d 284 (5th Cir. 1970); *Booker* v. *Phillips*, 418 F.2d 424 (10th Cir. 1969).

Moreover, a petitioner, incarcerated as the result of a state court judgment, may raise a plea of former jeopardy in a federal habeas corpus forum. *Galloway* v. *Beto*, *supra*; *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2nd Cir. 1965); *But cf. Barker* v. *State of Ohio*, 328 F.2d 582 (6th Cir. 1964). Otherwise, there would exist only minimal opportunity to afford the retroactive protection *Benton* demands. A claim of former jeopardy, furthermore, must be tested by the application of federal stand-

ards. *United States ex rel. Sommerville* v. *Illinois*, 447 F.2d 733 (7th Cir. 1971); *Booker* v. *Phillips, supra.*

The Fifth Amendment protection is, of course, qualified because not all subsequent prosecutions are automatically barred. For example, an accused may be constitutionally retried where the first jury is unable to arrive at a verdict, *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); where the judge discovers that one or more members of the jury may harbor an important bias, and dismisses the panel, *Thompson* v. *United States*, 155 U.S. 271 (1894); where a prior conviction is vacated upon appeal, *Ball* v. *United States*, 163 U.S. 662 (1896); or where the conviction is set aside in a collateral proceeding. *United States* v. *Tateo*, 377 U.S. 463 (1964). However, apart from a narrow category of cases in which a subsequent prosecution is clearly permissible, the Supreme Court, recognizing the elusive nature of the problem, has steadfastly declined to formulate hard and precise rules. Instead, each case is to be resolved on an individual basis. An ultimate determination must rest, therefore, upon a review and evaluation of the circumstances. *United States* v. *Perez*, *supra*; *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Gori* v. *United States*, 367 U.S. 364 (1961); *Downum* v. *United States*, *supra*; *United States* v. *Jorn*, 400 U.S. 470 (1971); *Green* v. *United States*, 355 U.S. 184 (1957).

Nonetheless, the accused or the petitioner is not left to judicial vagary, nor is the reviewing tribunal a vessel adrift. A lighthouse, however distant or dim, has been erected and manned. Mr. Justice Story articulated the familiar standard:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in

> their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any chances of life in favor of the prisoner. *United States* v. *Perez, supra* at 579.

The rule, then, is one of reason and sensibility; discretion is vested in the trial judge. Reduced to essentials, it is a matter of balancing a defendant's right to be free of successive prosecutions against the interest of society in punishing those who commit crimes. The balance, however, is not delicate: the scales are automatically tipped in favor of the accused. *Downum* v. *United States, supra.* Nevertheless, the state's handicap is not insuperable. All courts recognize that ". . . a criminal trial is, even in the best of circumstances, a complicated affair to manage." *United States* v. *Jorn, supra* at 479.

To meet or surmount the burden, the state must show a "manifest necessity", and "urgent circumstances" which dictate a mistrial. In a capital case, special consideration must be given to the rights of the accused. Any doubt as to the necessity of a mistrial, moreover, must be resolved in favor of the liberty of the accused. *Downum* v. *United States, supra.*

The mandate is easy enough to verbalize. Considerable difficulty may arise, however, when it is applied in specific cases. *E.g., United States* v. *Walden,* 448 F.2d 925

(4th Cir. 1971); *United States* v. *Smith*, 390 F.2d 420 (4th Cir. 1968); *Featherston* v. *Mitchell*, 418 F.2d 582 (5th Cir. 1969), cert. denied 397 U.S. 937; *Howard* v. *United States*, 372 F.2d 294 (9th Cir. 1967), cert. denied 388 U.S. 915; *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968), cert. denied 393 U.S. 867; *Oelke* v. *United States*, 389 F.2d 668 (9th Cir. 1967), cert. denied *Graves* v. *United States*, 390 U.S. 1029.

Claims of former jeopardy may arise in a variety of contexts. Here, of course, we are concerned with the limited range of cases in which the trial judge terminates the proceedings after the jurors are impaneled but before they are called upon to decide the issue, and without the accused requesting a mistrial. *E.g. Houp* v. *Nebraska*, 427 F.2d 254 (8th Cir. 1970), cert. denied 401 U.S. 924. Inquiry is limited to a single *post hoc* determination: did the trial judge abuse his limited discretion by allowing, under the circumstances, a *nolle prosequi* which was tantamount to a mistrial?

To support his contention, the petitioner relies upon *Downum*. However, after a careful consideration of the circumstances, this court is convinced that *Downum*, while controlling, does not dictate the result which petitioner seeks. There, the jury was discharged after the prosecution discovered that an important witness was absent. The defendant was in no way responsible for the absence, and the government could have proceeded with proof on several other counts of the indictment. The conviction by a second jury was reversed; but the court "refuse[d] to say that the absence of witnesses 'can never justify discontinuance of a trial.'" *Downum* v. *United States*, *supra* at 737.

In the case *sub judice* the witness who invoked the privilege against self-incrimination was, in effect, absent

and unavailable to testify. Unlike *Downum,* however, the indictment charged only one count, and, especially in view or the unexpected dismissal of Luster, the testimony of Louis Banks was absolutely essential. While the prosecutor could have taken more effective steps to cement his position, the court is convinced that the effective absence of the witness, under these particular circumstances, created a "manifest necessity" for a mistrial. It must be noted that the invocation of the privilege against self-incrimination was largely the result of the course pursued by petitioner's trial counsel; a course which was a solicitation for the mistrial. The district attorney had been led to believe that Banks would testify. It was not until Banks was called as a witness that the decision was made by him and his attorney to invoke the Fifth Amendment privilege. Petitioner's trial attorney was instrumental in bringing this about. The court said in *Downum, supra,* at 736, "at times the valued right of a defendant to have his trial completed by that particular tribunal summoned to sit in judgment on him may be subordinated to the public interest when there is an imperious necessity to do so."

If the state's evidence on the second trial is to be believed, as it evidently was by the jury, it reveals a deliberate crime in the commission of which, the victim's life was feloniously taken. The district attorney had the duty to protect the public, and to endeavor to see that justice prevailed. The public interest would not have been served by continuing the trial under the circumstances. Petitioner's right to have the trial completed at the first hearing must be, in this instance, subordinated to the public interest

There remains, however, a question as to the full impact of *United States* v. *Jorn, supra,* on this case. *Jorn* is apparently a significant addition to the "manifest necessity" doctrine. Undercutting the "party benefitted" test,

Jorn holds that a trial judge must not foreclose the defendant's option to have his trial completed by a particular tribunal until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. At least one court has afforded retroactive application to *Jorn*. *United States* v. *Walden, supra*. While the trial judge in the state court acted immediately on the prosecutor's request for a *nolle prosequi*, without requiring him to explore alternative avenues, the record reflects that the trial judge was fully advised and informed of all matters necessitating the *nolle prosequi*.

Jorn deals directly with *sua sponte* declarations by which the trial judge alone acts to foreclose the defendant's option. In the case *sub judice*, the action of petitioner's trial attorney effectively foreclosed the petitioner's valued right to proceed to a conclusion before the first jury. The court, therefore, holds that *Jorn* does not require that the petitioner be discharged from custody.

Throughout this action, there has been absolutely no proof, nor even an intimation, of prosecutorial or judicial overreaching. Clearly, the second trial was not initiated to harass the petitioner. It was dictated by an imperious and compelling necessity.

An appropriate order will be entered finally dismissing the petition for a writ of habeas corpus.

This, the 6th day of December, 1972.

/s/ Orma R. Smith
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC 7234-S

TOMMY McNEAL,
Petitioner

v.

JOHN ALLEN COLLIER, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY,
Respondent

Order

This action is before the court after a full evidentiary hearing on petitioner's application for a writ of habeas corpus. The court has received and considered memoranda of authorities from counsel for the petitioner and respondent. Being now fully advised as to all issues involved, the court is of the opinion and so finds that the petition for a writ of habeas corpus filed herein by petitioner is not well taken and should be denied. It is, therefore, on such finding and for the reasons set forth in a Memorandum of Decision this day released by the court in this action,

ORDERED AND ADJUDGED:

1) That the petition for a writ of habeas corpus filed herein by Tommy McNeal, petitioner, shall be, and the same hereby is, in all things, denied;

2) That the said petition shall be, and the same hereby is, dismissed on the merits.

This, the 6th day of December, 1972.

/s/ Orma R. Smith
United States District Judge

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1214

TOMMY McNEAL,
Petitioner-Appellant,

versus

WILLIAM HOLLOWELL, Superintendent,
Mississippi State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion July 13, 1973, 5 Cir., 1973, F.2d).

(November 23, 1973)

Before BROWN, Chief Judge, COLEMAN and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of

one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

COLEMAN, Circuit Judge, dissenting:

For the reasons enumerated in the dissent to the original panel opinion, I respectfully dissent to the denial of rehearing en banc.

APPENDIX "D"

Tommy McNEAL

v.

STATE of Mississippi.

No. 45587.

Supreme Court of Mississippi.

Feb. 2, 1970.

Defendant was convicted before the Circuit Court, Coahoma County, E. H. Green, J., of murder and he appealed. The Supreme Court, Robertson, J., held that instruction that in attempt to rob victim, defendant "did wilfully, unlawfully and feloniously shoot and kill" victim, and instruction defining offenses of robbery and attempted robbery were properly given in view of proof that defendant was in act of robbing or attempting to rob victim at time he shot and killed him.

Affirmed.

Homicide (Key) 289

Instruction that in attempt to rob victim, defendant "did wilfully, unlawfully and feloniously shoot and kill" victim, and instruction defining offenses of robbery and attempted robbery were properly given in murder prosecution in view of proof that defendant was in act of robbing or attempting to rob victim at time he shot and killed him.

J. W. Kellum, Sumner, for appellant.

A. F. Summer, Atty. Gen., by Guy N. Rogers, Asst. Atty. Gen., and Velia Ann Mayer, Sp. Asst. Atty. Gen., Jackson, for appellee.

ROBERTSON, Justice:

The appellant, Tommy McNeal, was indicted, tried and convicted of the crime of murder in the Circuit Court of Coahoma County, Mississippi. The jury, in its verdict, fixed the punishment at life imprisonment in the penitentiary.

About 11:30 p. m., March 9, 1968, James Bogan Weems, the manager of the Red Bird Service Station on U. S. Highway 61 in Clarksdale, Mississippi, was killed with a single pistol shot. The proof was that the appellant attempted to rob the Red Bird Service Station and shot the manager when he resisted. The evidence was sufficient to prove beyond a reasonable doubt that the appellant committed the offense, and the jury was justified in returning a verdict of guilty.

The principal complaints of the appellant are: that the trial court erred in granting (1) an instruction for the State containing this language, "* * * and in said attempt to rob the said James Bogan Weems, did willfully, unlawfully and feloniously shoot and kill James Bogan Weems," and (2) an instruction defining the offenses of robbery and attempted robbery.

The granting of both of these instructions was proper in this case. The proof was that the appellant was in the act of robbing or attempting to rob James Bogan Weems at the time he shot and killed him.

Witnesses testified that the appellant made the statement that he was going to get some money, that he exhibited his pistol to them before the attempted robbery

and killing, that money was found on the driveway of the service station after the shooting, and that the drawer of the cash register was open. The evidence was ample and sufficient to justify a definition of these two collateral offenses.

41 C.J.S. Homicide § 361 (1944) thus explains the applicable law:

> "Where a homicide is perpetrated in the commission of another offense, and is for that reason murder, or murder in the first or other degrees, whether or not there is a specific intent to kill * * * an instruction defining the law applicable to such a state of facts may and should be given. An instruction as to a collateral offense should properly define and explain the other offense involved * * *."

The trial court properly defined and explained the other offense involved. The instructions, when considered and read together, were not contradictory and clearly and adequately informed the jury of the applicable law. We find no error in them. The judgment of the trial court is affirmed.

Affirmed.

GILLESPIE, P. J., and JONES, PATTERSON and INZER, JJ., concur.